

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE)	
APPLICATION FOR BENEFICIAL)	FINAL
WATER USE PERMIT 76G-097326)	ORDER
BY WILDER RESORTS INC)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation accepts and adopts the Findings of Fact and Conclusions of Law as contained the March 9, 1998, Proposal for Decision, and incorporates them by reference.

WHEREFORE, based upon the record, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76G-097326 is issued to Wilder Resorts Inc. to appropriate 130 gallons per minute up to 104.00 acre-feet of ground water by means of a well at a point in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 03 North, Range 10 West, Silver Bow County, Montana. The permitted use is geothermal heating and recreation from April 1 through September 30, inclusive of each year. The permitted place of use is the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 2.

A. ** WATER MEASUREMENT RECORDS REQUIRED:

The appropriator shall install a Department approved in-line flow meter at a point in the delivery line approved by the department to record the flow rate and volume of water diverted. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep monthly written records of the flow rate and volume measurements and shall submit the records by November 30 of each year and upon request at other times during the year. Failure to submit records may be cause for revocation or modification of a permit or change. The records must be submitted to the Water Resources Regional Office. Contact the regional office listed below to obtain their current address.

HELENA PH: 406-449-0944 FAX: 406-442-9315

The appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

B. ** LIABILITY WAIVER:

The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

C. ** EASEMENT INFORMATION:

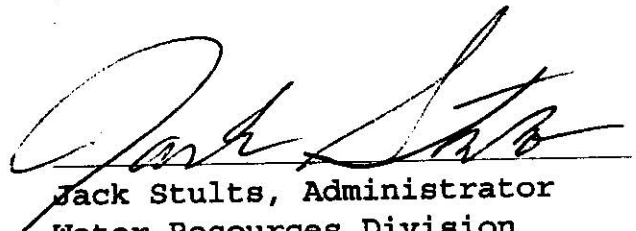
The issuance of this permit by the Department in no way grants the appropriator any easement rights or the right to enter upon the property of other persons or National Forest system lands to exercise this permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 14th day of April, 1998.



Jack Stults, Administrator
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Final Order was served upon all parties of record at their address or addresses this 16th day of April, 1998, as follows:

Wilder Resorts Inc
Fairmont Hot Springs
1500 Fairmont RD
Anaconda MT 59711

David McLean
Knight, Dahood, McLean,
Everette, & Dayton
113 East Third St
Anaconda, MT 59711

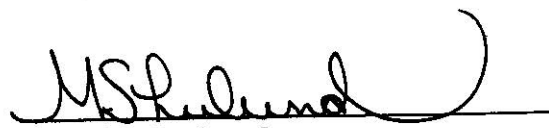
George S King
1932 S Gaylord ST
Butte MT 59701

William H Peterson
805 Durant Canyon RD
Anaconda MT 59711

Terri McLaughlin, Manager
Jim Gilman, WRS
Helena Water Resources
Regional Office
28 N Last Chance Gulch
P.O. Box 201601
Helena, MT 59620-1601
(via electronic mail)

Nancy Andersen, Chief
Water Rights Bureau
Department of Natural
Resources & Conservation
P.O. Box 201601
Helena, MT 59620-1601
(hand delivered)

Vivian A. Lighthizer
Hearing Examiner
Water Resources Division
Department of Natural
Resources & Conservation
P.O. Box 201601
Helena, MT 59620-1601
(hand delivered)


Mandi Shulund
Hearings Assistant

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE)	
APPLICATION FOR BENEFICIAL)	PROPOSAL
WATER USE PERMIT 76G-097326)	FOR
BY WILDER RESORTS INC)	DECISION

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing was held in the above-entitled matter on December 17, 1997, to determine whether a beneficial water use permit should be granted to Wilder Resorts Inc. for Application for Beneficial Water Use Permit 76G-097326 under the criteria set forth in Mont. Code Ann. § 85-2-311 (1995).

APPEARANCE

Applicant, Wilder Resort Inc. appeared at the hearing by and through counsel, David McLean. Ed Henrich, General Manager of Fairmont Hot Springs Resort; Vern Cook, Maintenance Supervisor, Fairmont Hot Springs Resort; and Stewart Smith, Hydrogeologist with MSE-HKM Engineering, appeared at the hearing as witnesses for the Applicant.

Objector, George King, appeared at the hearing in person. Norman King, Hydrogeologist, appeared at the hearing as a witness for Objector King.

Objector, William Peterson, appeared at the hearing in person.

Kirk Waren, Hydrogeologist with the Department of Natural Resources and Conservation (Department) appeared at the hearing and was called to testify by Objector King.

EXHIBITS

Applicant's Exhibit 1 is USGS Opportunity Quadrangle Montana topographic map. Objector King objected to this exhibit on the basis that it is provisional map and that Norman King had used the original map in the file to form his conclusions. The Hearing Examiner reserved a ruling on this objection to be addressed during this Proposal. The map Mr. Norman King used is a copy of a portion of this exhibit included in Kirk Waren's memorandum to T.J. Reynolds dated January 24, 1994. The map Mr. King used has contour intervals of 40 feet and the dotted lines are trail designations. What appear to be dotted contour lines are simply the result of poor copying. The objection is overruled and the exhibit is accepted into the record.

Objector King's Exhibit 1 is a copy of Mr. Norman King's resume. This exhibit was accepted into the record without objection.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. Application for Beneficial Water Use Permit 76G-097326 in the name of Wilder Resorts Inc. and signed by Vern Cook, Jr. was received in the Helena Water Resources Regional Office on

Proposal for Decision 76G-097326
by Wilder Resorts, Inc

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CASE # 97326

January 9, 1996 at 10:48 a.m. (Department file.)

2. Pertinent portions of the application were published in the *Anaconda Leader*, a newspaper of general circulation in the area of the source, on May 21, 1997. Additionally, the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed project. Two objections to the application were received. Applicant was notified of these objections by a letter from the Department dated July 3, 1997.

George King objected to this application by Wilder Resorts Inc. because he believes applicant is responsible for his well going dry in the last 4.5 years.

William H. Peterson filed an objection to the application on the basis that the subject well is drilled on his property without having any right at the time to do so. Mr. Peterson maintains Applicant was supposed to buy the land and so far they have not. (Department file.)

During the hearing, Mr. Henrich testified to a Perpetual Easement signed by William and Geraldine Peterson filed in the Silver Bow Courthouse on March 24, 1989, Roll Card 110, Card 52. (Testimony of Ed Henrich.)

3. Applicant seeks to appropriate 130 gallons per minute up to 104.00 acre-feet of ground water by means of a well at a point in the SE~~NE~~SW~~W~~ of Section 2, Township 03 North, Range 10 West, Silver Bow County, Montana. The proposed use is geothermal

heating and recreation from April 1 through September 30, inclusive of each year. The proposed place of use is the SE¼NW¼ of said Section 2. (Department file.)

4. Applicant has proven by a preponderance of evidence there is water physically available at the proposed point of diversion in the amount Applicant seeks to appropriate and water can be considered legally available, in the amount requested during the period in which Applicant seeks to appropriate. Applicant has used this well for these purposes for eight or nine years with no notice of impact to other wells in the vicinity. The use of this well does affect Gregson Springs which were the first source of water for the resort and were used to supply the pools. In 1988 or 1989, there was a lot of turbidity in the spring water and the health department was closing the pools on a regular basis because of the high fecal count. Because the well and Gregson Springs are in the same aquifer, the well was substituted for the springs during the summer months. The well produces cleaner, hotter water. (Department file and testimony of Ed Henrich, Vern Cook, and Stewart Smith.)

5. Applicant has proven by a preponderance of evidence it has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicant owns the property where the water would be put to beneficial use. (Department file.)

6. Applicant has proven by a preponderance of evidence the proposed uses, geothermal heating and recreation, are beneficial

uses. Mont. Code Ann. § 85-2-102(2)(a) (1995).

7. Applicant has proven by a preponderance of evidence the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation would not be adversely affected.

Although Objector King's expert witness expounded at length on his theory of the ground water in the area and how this well adversely affects Objector King's well, his data was based on a map with 40 feet contour intervals which he mistakenly thought were 20 feet contour intervals. That error skewed all his calculations. There are reports in the Department file from five other experts, hydrologists or hydrogeologists, that conclude there is no adverse effect to other water rights from pumping this well. One of those reports concludes the information available suggests Objector King's well is largely independent of water withdrawals by Fairmont. (Department records, file, and testimony of Norman King.)

8. Applicant has proven by a preponderance of evidence the proposed means of diversion, construction, and operation of the appropriation works are adequate. The means of diversion has been in use since 1987 under Permit 41I-P065936. This application is to extend the period of use to year round use, nothing more. The aforementioned permit has a period of use from October 1 through April 1. This application proposes to appropriate from April 1 through October 1, inclusive of each year from that same source, a geothermal well.

9. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1995).

2. Applicant has met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 9. Mont. Code Ann § 85-2-311 (1995).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 76G-097326 is issued to Wilder Resorts Inc. to appropriate 130 gallons per minute up to 104.00 acre-feet of ground water by means of a well at a point in the SE¼NE¼SW¼ of Section 2, Township 03 North, Range 10 West, Silver Bow County, Montana. The permitted use is geothermal heating and recreation from April 1 through September 30, inclusive of each year. The permitted place of use is the

SE¼NW¼ of said Section 2.

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HELENA PH: 406-449-0944 FAX: 406-442-9315

The appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

B. ** LIABILITY WAIVER:

The issuance of this right by the Department shall not reduce the appropriator's liability for damages caused by the appropriator's exercise of this right. Nor does the Department in issuing the right in any way acknowledge liability for damage caused by the appropriator's exercise of this right.

C. ** EASEMENT INFORMATION:


The issuance of this permit by the Department in no way grants the appropriator any easement rights or the right to enter upon

the property of other persons or National Forest system lands to exercise this permit.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the record. Vague assertions as to what the record shows or does not show without citation to the precise portion of the record will be accorded little attention. Any exception containing obscene, lewd, profane, or abusive language shall be returned to the sender. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

Dated this 9th day of March 1998.


Vivian A. Lightizer
Hearing Examiner
Water Resources Division
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 9th day of March, 1998, as follows:

Wilder Resorts Inc
Fairmont Hot Springs
1500 Fairmont RD
Anaconda MT 59711


David McLean
Knight, Dahood, McLean,
Everette, & Dayton
113 East Third St
Anaconda, MT 59711

George S King
1932 S Gaylord ST
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